Nos. 04-1528 and 04-1530

Supreme Court, U.S.
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In The
Supreme Court of the United States

NEIL RANDALL, et al.,

Petitioners,

v.

WILLIAM SORRELL, et al.,

Respondents.

VERMONT REPUBLICAN STATE COMMITTEE, et al.,

Petitioners,

v.

WILLIAM H. SORRELL, et al.,

Respondents.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF AMICUS CURIAE OF THE SECRETARIES OF STATE OF NEW HAMPSHIRE, OREGON AND WISCONSIN IN SUPPORT OF GRANTING THE PETITIONS WITH REGARD TO THE FIRST QUESTION PRESENTED

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INTEREST OF *AMICI*

Amici include the following Secretaries of State: William M. Gardner, Secretary of State of New Hampshire, Bill Bradbury, Secretary of State of Oregon, and Douglas La Follette, Secretary of State of Wisconsin.[1] *Amici* serve as the chief elections officers of their states, which gives them extensive experience with the issues raised in this case.

Amici seek review of the Second Circuit's decision because, although they believe that it is supported by this Court's holding in *Buckley v. Valeo*, 424 U.S. 1 (1976), it is contrary to similar decisions of the Sixth and Tenth Circuits. As the chief elections officers in their states, they are particularly concerned about the impact that the split in the Circuits' decision will have on the ability of States and localities to enact effective reform measures sought by their citizens and legislators. Moreover, *Amici* are concerned about the detrimental impact that the split among the Second, Sixth and Tenth Circuits will have on their efforts to enact innovative campaign finance laws. As discussed further below, the present uncertainty regarding mandatory spending limits has a chilling effect on the creativity of the State and local governments which should be serving as laboratories of democracy.

If the Sixth and Tenth Circuits correctly interpreted *Buckley* as imposing a *per se* ban on mandatory campaign spending limits, *Amici* urge this Court to reconsider its holding in *Buckley* and permit Vermont to demonstrate

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[1] The parties have consented to the filing of this brief. Their letters are on file with the Clerk of this Court. Pursuant to Rule 37.6, *Amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity made a financial contribution to the preparation or submission of this brief.

that its campaign expenditure limits satisfy constitutional requirements. If such a *per se* ban truly exists as a result of *Buckley* that ban will stifle the creativity of States and localities in this arena. As the Respondents demonstrate, the circumstances that led this Court to enact that barrier 29 years ago have changed. This Court should reconsider the extent of First Amendment limits on campaign expenditure laws.[3]

STATEMENT OF THE CASE

This case involves amendments to its campaign finance laws enacted by the State of Vermont in 1997. These amendments were adopted with the overwhelming approval of bipartisan majorities of both houses of the Vermont Legislature. *See Landell v. Sorrell*, 382 F.3d 91, 100 (2d Cir. 2004). The amendments have succeeded in "preventing the reality and appearance of corruption, and protecting the time of candidates and elected officials." *Id.* at 124. As the *Landell* District Court found, and the Second Circuit agreed, limits on campaign contributions alone have been ineffective in achieving those goals in federal elections. *Id.* at 116-125. The Second Circuit summarized additional ills attributable to the lack of spending limits in our current system of campaign finance. *See id.* at 115.

A split among the circuits exists on this important issue. The Second Circuit, in this case, held that *Buckley* does not erect a campaign spending limits barrier while the Sixth and Tenth Circuits have held that such a barrier

[3] *Amici* also support the conditional cross-petitions of both William H. Sorrell, et al., the Respondent-Conditional Cross Petitioner and Vermont Public Interest Research Group, et al., Respondent-Intervenors-Conditional Cross Petitioners.

exists. *See* Randall Petition for Certiorari at 22; Vermont Republican State Committee ("VRSC") Petition for Certiorari at 5-7. The importance of this issue is demonstrated by studies that show the current degree of cynicism among the population and diminishing voter turnout. Regardless of the actual scope of *Buckley's* holding, *Amici* urge this Court to grant the Petition and remove the cloud over the constitutionality of campaign spending limits.

REASONS FOR PARTIALLY GRANTING THE PETITIONS

Amici urge granting the petitions with regard to the first question presented for three reasons. The first is the strong citizen desire for reform. That desire has expressed itself in numerous reform efforts. While some State and local legislative bodies have interpreted *Buckley* to allow mandatory campaign spending limits, the available data show that many have not enacted such limits because they believe that *Buckley* bars them. Second, this Court has recognized the benefit of allowing state legislatures – as the laboratories of democracy – to function as unfettered by judicial constraints as reasonably possible. Third, whether or not *Buckley* is correctly read to impose a *per se* barrier, declaring now that no such barrier exists will enable States and localities to address the problem more effectively because more minds will come to bear on the issue.

1. There is a strong desire for reform and experimentation in State and local governments. The results are simple expressions of disappointment with the high cost of campaigns and the perception of corruption that flows from the realities of fund raising. This appetite becomes

apparent with attempts to enact campaign spending limitations at the federal, State and local levels.

a. Politicians consider the fund-raising process debilitating because it takes away time that could be spent more valuably by serving their constituents. Politicians and commentators alike believe that too much valuable time is devoted to this ceaseless endeavor to raise funds.[3] This problem presents itself at the federal and local levels. At the state level, one study has shown that a majority of candidates for statewide office spend at least one-quarter of their time fund raising for their campaigns; nearly one-third of candidates for state legislative office are similarly preoccupied with fund raising.[4]

In addition, numerous Congressmen have recounted their fund raising experiences. For example, one Republican Senator (unnamed) admitted, "I knew Congress well before I came here, but I did not know the amount of time consumed by fundraising and how that encroaches on your

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[3] *See* Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising*, 94 COLUMBIA L. REV. 1281 (1994) (stating that candidates spend too much time fund raising) [hereinafter Blasi, *Free Speech*] *citing*, DAN CLAWSON ET AL., MONEY TALKS: CORPORATE PACS AND POLITICAL INFLUENCE 79, 203-04 (1992); FRANK J. SORAUF, INSIDE CAMPAIGN FINANCE: MYTHS AND REALITIES 72-73, (1992); BROOKS JACKSON, HONEST GRAFT: BIG MONEY AND THE AMERICAN POLITICAL PROCESS 69, 91-92, 108 (1990); DAVID B. MAGLEBY & CANDICE J. NELSON, THE MONEY CHASE: CONGRESSIONAL CAMPAIGN FINANCE REFORM 43-45, 197 (1990); BURDETT LOOMIS, THE NEW AMERICAN POLITICIAN: AMBITION, ENTREPRENEURSHIP, AND THE CHANGING FACE OF POLITICAL LIFE 195-96 (1988); ELIZABETH DREW, POLITICS AND MONEY: THE NEW ROAD TO CORRUPTION 96 (1983). *Id.* at 1281 n.1.

[4] Paul S. Herrnson and Ronald A. Faucheaux, *Candidates Devote Substantial Time and Effort to Fundraising* (July 7, 2000), *at* http://www.bsos.umd.edu/gvpt/herrnson/reporttime.html.

ability to work here. It devours one's time – you spend the two or three years before your re-election fundraising. The other years, you're helping others."[5] Likewise, former House Majority leader Richard Gephardt has also explained that "[i]f you have the need to raise three or four hundred thousand dollars, you're taking an enormous amount of the member's time just to raise money."[6]

The costs of elections at both the Federal and State levels have continued to skyrocket. This trend of rising costs, while evident to the *Buckley* Court in 1976, has continued to increase in the ensuing 29 years. The need for politicians to spend huge sums to win elections raises the perception of, and conditions for, corruption. Campaign funds often come from special interest groups with legislative agendas. When politicians win elections with these funds and then continue to receive financial backing from these same special interest groups, these politicians are likely to feel pressure to cater to these groups. *See Landell*, 382 F.3d at 117-118. Perhaps that is why the phrase "special interest politics" has become so commonplace in our national political discourse.

Similar to the problem with "special interest politics," a select few wealthy individuals and groups contribute the majority of campaign finances and thus possess a concentration of the political power. At least one commentator has posited that this power concentration creates a form of

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[5] PETER LINDSTROM, CENTER FOR RESPONSIVE POLITICS, CONGRESS SPEAKS: A SURVEY OF THE 100TH CONGRESS 80 (1988).

[6] Elizabeth Drew, Politics and Money: The New Road to Corruption 51 (1983).

vote dilution and is "incompatible with the Constitution's command of equality."[7]

Politicians routinely confirm that this problem is real. For example, former Rep. Dan Glickman (D-Kan.) admits that "[m]oney has made it more difficult for Democrats to define an economic agenda that is different from the Republican agenda; we are taking from the same contributors."[8] These very reasons are why Congress periodically considers solutions to free candidates from excessive fundraising obligations.[9]

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[7] Mark C. Alexander, *Money in Political Campaigns and Modern Vote Dilution*, 23 Minn. J. of Law & Inequality 239, 244-45 (2005).

[8] Ken Hechler, *Financing Elections: West Virginia, the States, and the Nation*, 7 W. VA PUBLIC AFFAIRS REPORTER 3 (1990), *available at* http://www.polsci.wvu.edu/ipa/par/report_7_3.html [hereinafter Hechler, *Financing Elections*]. *See also, Free Speech and Campaign Finance Reform: Subcommittee Hearing on the Constitution Before the House Comm. on the Judiciary, 105th Cong. Sess.* 1 (1997) (attaching statement of Gene Karpinski, Executive Director of U.S. Public Interest Research Group stating "with this kind of influence accorded to big money in our political system, the candidates and the political parties will increasingly look alike on all issues of importance to moneyed interests"), *available at* http://www.house.gov.judiciary/22226.htm [hereinafter Karpinski, *Free Speech and Campaign Finance Reform*].

[9] In 1993, Members of the House of Representatives frequently commented on it. *See, e.g.*, 139 CONG. REC. H10656 (daily ed. Nov. 22, 1993) (remarks of Rep. Gejdenson); *id.* at H10665 (remarks of Rep. Harman); *id.* at H10670 (remarks of Rep. Reed); *id.* at H10671 (remarks of Rep. Hughes); *id.* at H10672 (remarks of Rep. Beilenson); *id.* at H10675 (remarks of Rep. Woolsey); Beth Donovan, *House Takes First Big Step in Overhauling System*, 51 CONG. Q. WKLY. REP. 3246, 3248 (1993); Beth Donovan, *House Will Vote on Limits Nearly $1 Million in '96*, 51 CONG. Q. WKLY. REP. 3091 (1993). *See also*, Marcus & Babcock, *One Day in the Fundraising Trail: Dawn to Dusk/Chasing the Dollars*, THE BOSTON GLOBE, May 16, 1997 at A1, *quoting* U.S. Senator Robert Byrd of West Virginia in a March 1997 Senate floor speech: "The incessant money chase that permeates every crevice of our political

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b. To address this need, which is felt at the State and local levels as much as at the federal level, various State and local governments have enacted – or considered but declined to enact – campaign spending limits. Since this Court's ruling in *Buckley* in 1976, however, legislatures and legal scholars have often understood the first Amendment as prohibiting *per se* mandatory campaign spending limits regulation.[10] In January 1997, Senator Arlen Specter (of Pennsylvania) commented that fundamental campaign finance reform remained impossible without overturning *Buckley*.[11] In advocating for campaign finance reform, he further stated, "[m]y concept of running for elective office . . . is a matter of issues, a matter of tenacity, a matter of integrity and how you conduct a campaign."[12]

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system is like an unending circular marathon. And it is a race that sends a clear message to the people: that it is money, money, money that reigns supreme in American politics."

[10] Indeed, in "Congressional deliberations, opposition to campaign spending limits has most often been expressed in terms of constitutional concerns." *See* Blasi, *Free Speech*, *supra* note 2, at 1288, *citing*, Beth Donovan, *Constitutional Doubts Bedevil Hasty Campaign Finance Bill*, 51 CONG. Q. WKLY. REP. 2215, 2217 (1993); Beth Donavan, *Finance by Gutting Public Funding*, 51 CONG. Q. WKLY. REP. 1534, 1539 (1993); Beth Donavan, *Constitutional Issues Frame Constitutional Options*, 51 CONG. Q. WKLY. REP. 437 (1993).

[11] Senator Specter also noted in his remarks on the floor of the Senate that a growing group of prominent legal scholars have called for the reversal of *Buckley*. 143 CONG. REC. S557-01, S558 (daily ed. Jan. 21, 1997) (statement of Sen. Specter). *See also* Karpinski, *Free Speech and Campaign Finance Reform*, *supra* note 7.

[12] 143 Cong. Rec. at S558, *supra* note 10.; *see also*, John C. Bonifaz, Brenda Wright, and Gregory Luke, *Challenging Buckley v. Valeo: A Legal Strategy*, 33 AKRON L. REV. 39, 41 (1999) ("Members of Congress have introduced 11 bills since 1976 which would establish campaign spending limits for federal elections.") Further, the note cites the following examples: S. 1684, 98th Cong. (1st Sess. 1983); S. 1185, 98th Cong. (1st Sess. 1983); S. 59, 99th Cong. (1st Sess. 1985); H.R. 2473,

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He emphasized that running for office should not be a simple function of money.

In spite of this adversity, the appetite for reform remains strong, and State and local legislatures have attempted to adopt reforms within the constraints of *Buckley's* perceived *per se* barrier. For example, as noted by The Hoover Institution:

- Since 1990, 30 states have radically changed their campaign finance laws, 17 of them between 1995-98.
- From 1972-1996, 45 initiatives and/or referenda, as well as charter amendments on election reform, were placed on state ballots. In 36 of these cases, a majority of voters supported enactment.
- 24 states, as of 1998, have statutes on the books providing some sort of public financing for election campaigns. Also, 12 states and New York City have some form of expenditure limitation.
- What these various states – and many municipalities – have in common is strong voter sentiment for change, harnessed by diverse grassroots coalitions and reform-minded legislators.[13]

100th Cong. (1st Sess. 1987); H.R. 1456, 101st Cong. (1st Sess. 1988); H. Res. 168, 103rd Cong. (1st Sess. 1993); H.R. 3571, 103rd Cong. (1st Sess. 1993); H.R. 3651, 104th Cong. (2d Sess. 1996); H.R. 3658, 104th Cong. (2d Sess. 1996); S. 1057, 105th Cong. (1st Sess. 1997); H.R. 77, 105th Cong. (1st Sess. 1997). *Id.* at 41, n.17.

[13] *Hoover Institution: Public Policy Inquiry, Campaign Finance, State and Local Overview, at* http://www.campaignfinancesite.org/structure states1.html (last updated Sept. 20, 2004).

Various state and federal polls confirm that voters are overwhelmingly in favor of more effective campaign finance reform.

- Between 1976 to 1986, campaign spending in West Virginia state Senate races increased an average of 875% from approximately $155,000 to $1,511,000. In 1986, a sample of West Virginia voters were polled regarding whether they believed "there should be a limit on how much a person can spend on running for public office." 75.5% said yes, 16.8% said no, and 7.7% were undecided.[14]

- 64% of Arizonans support public funding for campaigns (Arizona Republic poll, Oct. 2002) and 66% specifically support Clean Elections (KAET poll, June, 2002). 80% of Arizonans believe that contributions influence votes on public policy (Behavior Research Center poll, December, 2001).[15]

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[14] Hechler, *Financing Elections*, *supra* note 5. In its 1990 sessions, West Virginia's House of Delegates "passed, by a vote of 86-14, a constitutional amendment 'to amend the State Constitution to permit the Legislature to limit the amount of money which can be spent advocating or opposing a nomination or election of any candidate, or the passage or defeat of any issue, thing or item to be voted upon at public election.' The elation of supporters of the constitutional amendment, scheduled to be placed on the general election ballot in 1990, was short-lived, however. The state Senate quickly buried the amendment by double referencing it to the Government Organization and Judiciary Committees, where it died without further consideration despite frantic and repeated efforts of the secretary of state to revive it." *Id.*

[15] California Clean Election Campaign, *Arizona – Clean Elections Works! at* http://www.caclean.org/content/victories/az_works.php?path=content/victories/az_works.php&.

2. At various times and in various contexts, this Court has espoused the value of deferring to the legislative process to produce creative solutions to pressing social problems. Indeed, it is a canon of this Court that such cases should be decided narrowly. *See McConnell v. Federal Election Comm'n*, 540 U.S. 93, 124 S. Ct. 619, 688 (2003). Aside from a constraint on overbroad pronouncements, the benefits to society that flow from allowing our legislatures to conduct the business of policy making through law weigh strongly in favor of clarifying that no *per se* barrier exists. As Justice Brandeis famously observed:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. . . . But in the exercise of this high power, we must ever be on guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (dissenting opinion) (cited in *Boy Scouts of America and Monmouth Council v. Dale*, 530 U.S. 640, 664 (2000) (Stevens, J., dissenting). *Cf. Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 292 (1990) (O'Connor, J., concurring) (the "challenging task of crafting procedures for

safeguarding ... liberty interests is entrusted to the 'laboratory' of the states ... in the first instance.")

This Court should remove the artificial limit on States and localities imposed by a *per se* prohibition on campaign spending limits and, instead, make clear that the proper standard of review of such legislation is and will be meaningful scrutiny that is not "'strict in theory, but fatal in fact.'" *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (Marshall, J., concurring in judgment)).

3. The current split among the circuits on this important issue demonstrates that it should be clarified by this Court. By clarifying *now* that no *per se* barrier is imposed by the First Amendment, this Court will be opening an avenue of reform to the States and localities eager to enact reform that they have avoided because of the belief that *Buckley* imposes a *per se* barrier to campaign spending limits.

Allowing the perception that the Sixth and Tenth Circuits correctly interpreted *Buckley* deprives citizens who reside within those Circuits of the creativity of the State and local legislatures whose spending limits legislation would surely be struck down.

The perception of a *per se* barrier constrains the legislative process in States and localities outside of those circuits. The chilling effect that flows from the uncertainty inherent in a circuit split is further compounded by the fact that every panel of circuit judges that has considered this issue has split on the question of whether *Buckley* imposes a *per se* barrier. The decision by the Second Circuit not to hear *Landell en banc*, alone, generated a 50-plus page collection of concurrences and dissents for a type

of decision typically disposed of with a single sentence. This effect cannot be ignored, for it extends far beyond the Tenth and Sixth Circuits.

Amici urge this Court to grant certiorari to decide whether to free our State and local legislatures from the constraints on their ability to experiment in the realm of campaign finance reform that are the byproduct of the belief that the First Amendment imposes a *per se* prohibition on campaign spending limits laws.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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